REPORTABLE ZLR(13)

Judgment No. SC 22/09
Civil Appeal No. 81/06

MAXMUS HAKUNAVANHU SAVANHU v (1) MAGNET MARERE N.O. (2) MASTER OF THE HIGH COURT (3) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
MALABA DCJ, CHEDA JA & GARWE JA
HARARE, JANUARY 20 & MAY 18, 2009

S Chihambakwe, for the appellant

M V Chizodza, for the first respondent

No appearance for the second and third respondents

MALABA DCJ: This is an appeal from a judgment of the High Court given on 9 March 2006 dismissing with costs an application for an order compelling the first respondent to transfer Stand 151 of Plot 216 of Good Hope Township of Good Hope into the appellant's name in terms of an agreement of sale entered into between the appellant and the late Robert Mubayiwa Marere on 30 October 1998.

The appellant and the late Robert Mubayiwa Marere ("the deceased") entered into a written contract on 30 October 1998 in terms of which the latter agreed to sell and the former agreed to purchase Stand 151 of Plot 216 of Good Hope Township of Good Hope ("the property") for $230 000.

The parties provided for two alternative methods of payment of the purchase price under Clauses 12 and 7. Under Clause 12 they agreed that the purchase price would be paid as follows:

> "1. The sum of $50 000 (fifty thousand dollars) to be paid to ERS REALTY'S TRUST ACCOUNT on signing of this Agreement of Sale.
>
> 2. The balance of $180 000 (one hundred and eighty thousand dollars) to be paid at the rate of $30 000 (thirty thousand dollars) per month commencing on the 1st of July 1998 with interest at the rate of 25% effected if the purchaser does not meet the deadline of 30 December 1998."

Under Clause 7 headed "TRANSFER" the parties agreed that:

> "Transfer shall be effected by the seller's conveyancers and the purchaser shall, within a period of fourteen days, pay or furnish a Bank or Building Society guarantee for payment of the purchase price against transfer. If such payment or guarantee shall not be furnished to the seller's conveyancers the purchase price shall bear interest at 19% per annum from the expiry of such period of fourteen (14) days until transfer shall be effected."

The details of payment provided for under Clause 7 are so different from those under Clause 12 that an inference must be drawn as a matter of construction from the terms used that the parties intended that the appellant would have to decide which of the two methods of payment to follow and be bound by the terms.

Under Clause 10 the parties agreed that in the event of the purchaser failing to pay any sum owing under the agreement on the due date or in the event of any breach of any other condition of the agreement, the seller had to give the purchaser

written notice to remedy the breach within fourteen days of the posting of such notice failing which the seller would be entitled to cancel and terminate the agreement of sale or alternatively have the option to institute legal proceedings against the purchaser for the balance of the purchase price then owing under the agreement.

Lastly, they agreed under Clause 11 that the agreement of sale constituted the entire contract between them and no variation of it would be valid unless reduced to writing and signed by or on behalf of the parties.

No payment of the sum of $50 000 was made by the appellant on signing of the agreement on 30 October 1998 in terms of Clause 12(1) of the contract. An amount of $50 000 had been paid to ERS Realty on 21 May 1998. The receipt states that the money was paid as a deposit of the purchase price in respect of stand 21G of Lot 216 of Good Hope Township. Mr *Chihambakwe* argued on appeal that Stand 21G of Lot 216 was in fact the same as Stand 151 of Lot 216 of Good Hope Township. Whilst that may be the case there was nothing said by the appellant in the founding affidavit to support the contention. Similarly the founding affidavit was silent as to whether Stand 21G of Lot 216 of Good Hope Township in respect of the purchase price of which an instalment of $30 000 was paid to ERS Realty on 31 July 1998 was the same as Stand 151 of Lot 216 of Good Hope Township.

Five receipts of payments of $30 000 made by the appellant to *Messrs Manase & Manase*, a firm of legal practitioners appointed as the seller's conveyancers,

were annexed to the founding affidavit. The payments were all made between 31 March and 12 October 1999. Each receipt state that the payment was a deposit for a purchase price for an unidentified piece of land. The payment is said to be to the credit of an entity called NYIKA Engineering.

Mr *Chihambakwe* suggested in argument on appeal that NYIKA Engineering was a company owned by the deceased. There was no reference to NYIKA Engineering in the founding affidavit. Even if it is a company there was no explanation given as to why it received payment of the money in terms of a contract to which it was not a party.

The respondent who became the executrix dative on 24 October 2003 in her husband's estate denied that the estate received any of the sums of money paid by the appellant to ERS Realty and *Messrs Manase & Manase* for the property. She denied knowledge of any relationship between NYIKA Engineering and the deceased in his lifetime. She went on to aver in para 2 of the opposing affidavit that:

> "It is also telling that the applicant has not been able to take vacant possession of the said stand since 1998 and has not claimed it until well after my husband's death and has not sought to enforce his rights to take transfer. This is so because my husband repeatedly informed him that he had not received the purchase price. It is therefore apparent that the applicant knows of the problems associated with this sale and wishes to take his chances with me."

The court *a quo* held that payment of the instalments of $30 000 per month to *Messrs Manase & Manase* constituted a breach of Clause 12(2) of the

agreement of sale as the appellant was bound to pay the money to ERS Realty. As a result the application was dismissed with costs.

The contention on appeal was that the learned Judge misdirected herself in making the finding that the payment of the instalments to *Messrs Manase & Manase* was in breach of Clause 12(2) of the agreement of sale. It was argued in the alternative that even if the payment was a breach of contract, the learned Judge ought not to have dismissed the application because the deceased or the first respondent had not initiated and completed the procedure agreed on by the parties under Clause 10 of the agreement of sale for termination of the contract.

To determine the correctness of the contention that the court *a quo* misdirected itself in holding that payment to *Messrs Manase & Manase* was in breach of Clause 12(2) it is necessary to decide the question as to which of the two methods of payment of the purchase price the appellant was found to have decided to follow. It is clear that the learned Judge took the view that he followed the method of payment provided for under Clause 12 of the contract. Mr *Chihambakwe* argued that the payments of the instalments were made in terms of Clause 7 of the agreement of sale.

The fact that there was in fact no payment of the deposit of $50 000 on signing of the agreement of sale on 30 October 1998 in terms of Clause 12(1) of the contract would suggest that the appellant decided to pay the purchase price in terms of Clause 7. It is, however, clear from the facts of the case that although the payment of

$50 000 to ERS Realty by the appellant on 21 May 1998 was at law not payment in terms of the agreement of sale, he believed that it was payment towards the purchase price of the property. Although he produced no evidence to support the allegation, the appellant had his case argued on the basis that Stand 21G of Lot 216 of Good Hope Township for the purchase price of which $50 000 was paid was in fact Stand 151 of Lot 216 of Good Hope Township.

The learned Judge was correct in finding on the facts that the appellant believed he had made the payments in terms of Clause 12 of the agreement of sale. I, however, do not agree with the finding by the learned Judge that if the payment to *Messrs Manase & Manase* was indeed in respect of Stand 151 of Lot 216 of Good Hope Township it was in breach of Clause 12(2) because it ought to have been made to ERS Realty.

The appellant was specifically required under Clause 12(1) of the agreement of sale to pay $50 000 of the purchase price to ERS Realty on signing of the contract. That exclusive mandate did not extend to the payment of the balance of $180 000. Clause 12(2) relating to the payment of the balance is silent as to whom the payment was to be made. It therefore had to be made to the deceased.

Payment of the instalments of the purchase price to *Messrs Manase & Manase* in terms of clause 12(2) of the agreement would not be in breach of the contract provided the appellant made sure that the deceased received the money. It is clear from

the facts that the appellant failed to prove that the payments he made were in terms of the contract. He failed to show that there was payment of $50 000 to ERS Realty on signing of the agreement. There was no term in the agreement of sale by which the parties acknowledged payment of $50 000 before the signing of the contract. There was no evidence at all in the papers to show that the deceased received any of the payments made either to ERS Realty before the signing of the agreement of sale or to *Messrs Manase & Manase* after the signing of it. The first respondent denied that the deceased received any of the payments. All that the appellant could say in the answering affidavit was that the question whether the deceased received the money in terms of the contract was not for him to answer.

The appellant chose to proceed by way of a court application to claim the order of specific performance against the first respondent. As the proceedings were by way of a court application and there were disputes of fact the final relief could only have been granted if the facts stated by the first respondent together with the admitted facts in the appellant's affidavit justified such an order. *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623(A) at 634H-635B.

As the court *a quo*, was not satisfied as to the inherent credibility of the factual averments in the appellant's affidavit and the first respondent's denial not found to have been patently false it correctly held that it could not grant the order sought.

The appellant had applied for an order of specific performance of the deceased's contractual obligation to transfer the property into his name by the first respondent. That a party to a contract has in an appropriate case a right to claim specific performance is not in doubt.

In *Shakinovsky v Lawson & Smulowitz* 1904 TS 326 INNES CJ said at p 330:

> "Now a plaintiff has always the right to claim specific performance of a contract which the defendant has refused to carry out, but it is in the discretion of the court either to grant such an order or not."

See also *Farmers Co-operative Society (Reg) v Berry* 1912 AD 319 at p 314; *Haynes v Kingwilliamstown* 1951(2) SA 371(A) at p 378; *Industrial & Mercantile v Anastassiou Bros* 1973(2) SA 601 at 607H-609A; *Ranch International Pipelines (Pvt) Ltd v LMG Construction (City) (Pvt) Ltd* 1984(3) SA 861 at 879D-I; *Minister of Public Construction v Zescon (Pvt) Ltd* 1989(2) ZLR 311(S) at 318 C-G.

The right to claim specific performance of a contract by the other party is premised on the principle that the appellant must first show that he has performed all his obligations under the contract or that he is ready, able and willing to perform his own side of the bargain. Wessels, *The Law of Contract in South Africa* vol 11 para 3135 states that:

> "The court will not decree specific performance where the plaintiff has himself broken the contract or made a material default in the performance on his part (*Lawson*, s. 472, p.522).
>
> A plaintiff is not entitled to succeed against a defendant in an action for breach of contract unless he can show that he has performed his part or is ready to do so, and therefore he cannot ask for specific performance unless he has either performed his part of the contract or unless he has been prevented from doing so by the defendant."

See also *Wolpert v Steenkamp* 1917 AD 493 at p 499.

The effect of the finding by the court *a quo* was that the appellant failed to show that he had fulfilled his own obligations under the contract. The view I have taken of the facts is also that the appellant failed to show on the papers that he had paid the purchase price of the property in terms of the agreement of sale. There was no payment of the sum of $50 000 on signing of the agreement of sale. There was no proof that the monies paid to *Messrs Manase & Manase* were received by the deceased. Even if these sums of money could have been paid to the credit of the deceased, they were paid after the date the appellant would have been bound under Clause 12(2) of the agreement of sale to complete the purchase of the property. The interest which would have been due and owing would not have been paid. The appellant did not tender any payment to show that he was ready, able and willing to fulfil his own obligations under the contract. By his own conduct the appellant disentitled himself to claim specific performance of the contract by the first respondent.

The appeal is accordingly dismissed with costs.

CHEDA JA: I agree

GARWE JA: I agree

Chihambakwe, Mutizwa & Partners, appellant's legal practitioners

M V Chizodza-Chinounye, first respondent's legal practitioners